Supreme Court, U.S.
FILED
SEP 1 1999
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No. 99-213

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SCS BUSINESS & TECHNICAL INSTITUTE, INC. *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELATOR'S BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Solicitor General accurately sets forth the question presented, as explained by the further statement in his Statement of the case that "[a]lthough the [Court of Appeals] did not squarely decide whether *qui tam* suits against state defendants would violate the Eleventh Amendment, its interpretation of [31 U.S.C.] Section 3729(a) was based in part on the principle that ambiguous statutory provisions should be construed in a manner that avoids substantial constitutional questions." (Pet., p. 4).

Ronald E. Long, the Relator in this False Claims Act case, respectfully responds to the petition for a writ of certiorari filed by the Solicitor General on behalf of the United States of America.

STATEMENT

The Solicitor General accurately sets forth a summary of the significant elements of the False Claims Act, 31 U.S.C.A. *et seq.* ("FCA"), in his paragraph 1.

To the summary of the subject matter of this case stated by the Solicitor General in his paragraph 2, the Relator respectfully adds:

As alleged by the Relator, the State of New York, by its officials, and particularly by its responsible agency director, engaged in a massive, four-year violation of the FCA in federal tuition assistance programs. By actively concealing the fraud of the private defendants, by limiting and subverting the Relator's agency investigation of that fraud, by demoting and firing the Relator, by entering into a concealing sweetheart deal with those defendants, and by directly misrepresenting to the United States that the defendants were not engaged in fraudulent conduct, the state defendants caused the United States Department of Education to pay more than $100 million in tuition payments to the private defendants in order to maintain the flow to the state of fees it imposed on the private defendants' receipt of those funds.

This case was filed in September 1992. Because of the state defendants' motions to dismiss and appeals, only limited discovery concerning documents and preliminary matters has been taken.

The Solicitor General accurately sets forth a summary of the proceedings in the Court of Appeals in his paragraph 3.

ARGUMENT

On June 24, 1999, this Court granted the petition for a writ of certiorari in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 ("*Stevens*"). The first question presented in that case and the question primarily presented in the instant case are identical — is a State or state agency a "person" subject to suit under the FCA. As stated in the petition for a writ of certiorari in the instant case, it is the position of the Relator, as well as the United States, that a State or state agency is a "person" subject to potential FCA liability under 31 U.S.C. § 3729(a). Moreover, as the Department of Justice stated in the Court of Appeals in the instant case, and as it states in *Stevens*, an affirmative answer on that issue does not implicate a bar to suits against states and state agencies under the Eleventh Amendment.

The Court's granting of the petition for a writ of certiorari in *Stevens* is a strong indication that the Court considers the primary question presented in the instant case, as well as the Eleventh Amendment issue, worthy of review by this Court and in need of resolution.

We agree with the Solicitor General that, because *Stevens* and the instant case present identical questions and because the Court previously indicated that this question begs resolution by this Court, the instant case is worthy of review.

Respectfully, however, we disagree with the Solicitor General that the petition for a writ of certiorari in the instant

case should be held pending this Court's decision in *Stevens*. If this Court should determine that states and state agencies are "persons" subject to suit under the FCA, and that the Eleventh Amendment does not bar *qui tam* cases of the type presented in *Stevens* and the instant case, there should be no need for further consideration of those issues in the instant case by the courts below.

After seven years of litigation, with little progress toward sharpening the issues in the trial court, the Relator and other litigants in this case should be given the most expeditious resolution of the threshold question of the amenability of the state defendants to suit under the FCA. Consolidation of the two cases will avoid unnecessary costs and delay to the courts, as well as the litigants. Holding the petition, as the Solicitor General suggests, would, we submit, waste the litigants' scarce resources and unnecessarily burden lower courts in assessing the application of a decision in *Stevens* in the instant case.

CONCLUSION

The petition for a writ of certiorari should be granted and the instant case should be consolidated with *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828.

Respectfully submitted,

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